UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

National Business Aircraft Association, Krueger Aviation, Inc., Harrison Ford, Justice Aviation, Kim Davidson Aviation, Inc., Aero Film, Youri Bujko, James Ross, Paramount Citrus LLC and Aircraft Owners and Pilots Association **Complainants** **v.** **City of Santa Monica, California** **Respondent**	**Docket No. 16-14-04**

DIRECTOR'S DETERMINATION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) based on a formal complaint filed in accordance with FAA Rules of Practice for Federally Assisted Airport Proceedings (FAA Rules of Practice), Title 14 Code of Federal Regulations (CFR) Part 16.[1]

National Business Aircraft Association, Krueger Aviation, Inc., Harrison Ford, Justice Aviation, Kim Davidson Aviation, Inc., Aero Film, Youri Bujko, James Ross, Paramount Citrus LLC and Aircraft Owners and Pilots Association (Complainants) filed a formal complainant pursuant to Title 14 CFR Part 16 against the City of Santa Monica, California, (City) owner, sponsor, and operator of the Santa Monica Airport (SMO).

Complainants allege that the City violated its grant assurance obligations based on the City's repeated and continued assertions that such obligations will no longer be in effect after June 29, 2014. The Complainants' contend that the grant assurances continue until August 2023. The Complainants seek a determination on the date that the grant assurances expire.

[1] Enforcement procedures regarding airport compliance matters may be found at *FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings* (14 CFR Part 16). These enforcement procedures were published in the Federal Register (61 FR 53998, October 16, 1996) and became effective on December 16, 1996.

With respect to the allegations presented in this Complaint, under the specific circumstances at SMO as discussed below and based on the evidence of record in this proceeding, FAA finds that the City of Santa Monica is obligated under the grant assurances until August 27, 2023.

The FAA's decision in this matter is based on applicable Federal law and FAA policy, review of the pleadings and supporting documentation submitted by the parties and reviewed by FAA, which comprises the administrative record reflected in the attached FAA Index.

II. THE PARTIES

Airport

SMO is a public-use airport owned and operated by the City. The 227-acre airport has approximately 269-based aircraft with 452 average aircraft operations per day. The airport is located in a congested air traffic area and serves as a reliever airport for Los Angeles International Airport, which is located seven miles to the south of SMO. The airport's runway is 4,987 feet long with 40-foot parallel taxiways on both sides of the runway.

The FAA conducted a General Aviation National Asset Study in May 2012 that designated SMO as a regional airport that supports regional economies by connecting communities to statewide and interstate markets.[2]

The FAA records indicate that the planning and development of SMO has been financed, in part, with funds provided by FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982 (AAIA), as amended, Title 49 United States Code (U.S.C.) § 47101, *et seq*. Between 1985 and 2003, SMO received approximately $9.7 million in Federal airport development assistance.

Complainants

The Complainants are tenants of SMO or organizations with members who are aviation users of the airport. The Complainants desire clarification concerning the expiration date of SMO's grant assurance obligations as determined by FAA. [FAA Item 1] The following descriptions of the Complainants are as provided in the Complaint.

The National Business Aviation Association, Inc. (NBAA) is a District of Columbia corporation that represents the interests of companies that operate aircraft. According to the NBAA, its membership includes more than 10,000 companies that operate aircraft in connection with their business or are otherwise involved in business aviation. These entities can or do utilize SMO including but not limited to Krueger Aviation, Inc. and Kim Davidson Aviation, Inc.

Krueger Aviation, Inc. (Krueger) is a California corporation engaged in the sale and brokerage of aircraft at SMO, where it has been a tenant for more than 40 years. Krueger currently occupies

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[2] See U.S. Department of Transportation Federal Aviation Administration, General Aviation Airports: A National Asset, May 2012.

approximately 10,000 feet of office and hangar space on two acres that it leases from the City on the south side of SMO. It leases office and hangar space to seven sub-tenant businesses and maintains tie-down space for approximately 30 aircraft.

Harrison Ford is an actor, businessman, and pilot. He has been a SMO tenant for 10 years, basing both fixed-wing (piston and jet) and rotor aircraft in his north-side hangar. Ford has testified before Congress as an advocate for general aviation and regularly flies missions in support of humanitarian causes.

Justice Aviation, a California corporation, is a full service flight school and aircraft rental facility located on the south side of SMO. A tenant for 21 years, Justice Aviation currently employs eight flight instructors and maintains between 9 and 11 aircraft for instruction and rental.

Kim Davidson Aviation, Inc., a California corporation, is an FAA certified Repair Station and a factory authorized Cirrus Aircraft service center located on the south side of SMO. It has been a tenant since 1982, employing a staff of 11.

Aero Film is a California limited liability company engaged in the production of television commercials. It is based at SMO, where it maintains offices and a hangar for two aircraft, a Cessna Citation SII and an MD 500 helicopter, both of which are used in its business. Aero Film has been a tenant for 11 years.

Youri Bujko is the owner and pilot of two aircraft, a Mooney Super M20 E and a Cessna Crusader, which he maintains for both business and personal use on the south side of SMO. He has been a tenant since 2008.

James Ross is a recreational flyer who owns a Cessna 170, based in tie-down space on the south side of SMO. He has been a tenant for 18 years.

Paramount Citrus LLC, together with its affiliates, is the largest vertically integrated citrus business in the United States. Paramount Citrus Aviation, based in Bakersfield, California, is the business department of the agricultural based companies owned and operated by Paramount Citrus LLC and its related entities. Paramount Citrus LLC and Paramount Citrus Aviation are jointly referred to herein as "Paramount." Paramount has been a user of SMO for more than 10 years, and logs approximately 235 monthly operations at SMO in support of its business operations. Paramount relies on SMO as a vital hub for employee travel to multiple destinations across the western United States.

The Aircraft Owners and Pilots Association, Inc., (AOPA) is an independent, not-for-profit education and advocacy association incorporated in New Jersey and headquartered in Frederick, Maryland. According to AOPA, it is the world's largest aviation membership association, representing approximately 370,000 pilots who fly for personal and business reasons. According to AOPA, more than 6,000 of its members are within a 25-mile radius of the City, and many of those members base their aircraft at SMO, including, but not limited to, Harrison Ford, Youri Bulko and James Ross. AOPA acts as their representative in this proceeding, consistent with FAA precedent. *See, e.g., Bombardier Aerospace Corp. v. City of Santa Monica,* Docket No. 16-03-11, Director's Determination, at 1 n.1 and 22 (January 3, 2005).

III. BACKGROUND AND PROCEDURAL HISTORY

Procedural History

Dated July 2, 2014, FAA received a Part 16 Formal Complainant alleging the Respondent violated 49 U.S.C. §47107(a) and airport Grant Assurances. [FAA Item 1]

Dated July 17, 2014, FAA issued the Notice of Docketing. [FAA Item 2]

Dated August 14, 2014, Respondent filed a Motion to Dismiss. [FAA Item 3]

Dated August 28, 2014, Complainant filed an Answer to the Motion to Dismiss. [FAA Item 4]

Dated October 20, 2014, Respondent filed the Answer of the City of Santa Monica, California. [FAA Item 5]

Dated October 30, 2014, Reply of the Complainants to the Respondent's Answer to the Complaint. [FAA Item 6]

Dated November 11, 2014, Respondent Filed the Rebuttal to the Reply Brief of Complainants. [FAA Item 7]

Dated February 19, 2015, FAA Requested Additional Information. [FAA Item 8]

Dated March 25, 2015, FAA received information from Complainants based on February request to Respondent for additional information. [FAA Item 9]

Dated April 1, 2015, FAA received information from Respondent based on February request to Complainant for additional information. [FAA Item 10]

Dated May 7, 2003, Letter from the City to FAA requesting the Grant be reopened and to award additional grant money. [FAA Item 11]

Undated Letter from FAA to the City agreeing to reopen the grant and disburse additional grant money. [FAA Item 12]

Final Construction Report, Airport Improvements, Santa Monica Airport, AIP Project No.3-06-0239-06 (II). [FAA Item 13]

Dated August 2, 1999, Letter from the City requesting Amendment No. 1 to the grant dated August 2, 1999. [FAA Item 14]

Santa Monica Airport, Airport Master Record, 5010. [FAA Item 15]

Dated August 6, 2015, Notice of Extension of Time to issue the Director's Determination to August 21, 2015. [FAA Item 16]

Dated August 21, 2015, Notice of Extension of Time to issue the Director's Determination to September 21, 2015. [FAA Item 17]

Dated September 21, 2015, Notice of Extension of Time to issue the Director's Determination to October 15, 2015. FAA Item 18]

Dated October 16, 2015, Notice of Extension of Time to issue the Director's Determination to December 4, 2015. [FAA Item 19]

Factual Background

SMO is a 227-acre airport located in a highly congested air traffic area, and is an important reliever airport for the Los Angeles International Airport (LAX), which is located just 7 miles to the south. As a reliever for LAX, SMO serves a vital and critical role as a general aviation reliever airport by diverting aircraft away from the air carrier airports and other more heavily used airports located in the Los Angeles area. SMO serves the role of a business airport capable of accommodating a wide range of business and personal aircraft, including corporate and business jets.

The City and FAA entered into a Settlement Agreement on January 31, 1984, (1984 Agreement) setting forth the terms and conditions under which the City would continue to operate SMO. Under the Agreement, the City agreed to operate and maintain SMO without derogation of its use as a reliever airport until July 1, 2015. The 1984 Agreement, by its terms, did not address obligations after its expiration nor did it release the City from its AIP Grant or Surplus Property Act obligations.

Relevant Grant History

On June 29, 1994, the City applied for and accepted an AIP grant from FAA for $1,604,700 for planning, airport development, or noise program implementation. [FAA Item 3 exhibit A, 2] The grant was issued in 1994 under AIP Grant No. 3-06-0239-06.

The projects under the grant were completed in two phases. The Final Construction Report, Airport Improvements, Santa Monica Airport, AIP Project No.3-06-0239-06 provided the timing for phase I. [FAA Item 13]

- Bid Opening – October 2, 1995
- Preconstruction Conference - February 5, 1996
- Work Started (Construction) – March 6, 1996
- Work Substantially Completed (Construction) – June 11, 1996
- Final Inspection – August 23, 1996

By letter dated August 2, 1999, the City asked to amend Grant No. 3-06-0239-06 to reflect modifications to the original scope of work under Phase I. The letter indicated that the *"request*

would not result in a change in the total project budget cost under the grant." [FAA Item 14] On November 8, 1999, The City executed Amendment No. 1. [FAA Item 5 exhibit 2]

By letter dated September 27, 2002, the City requested to amend Grant No. 3-06-0239-06 (II) to *"increase participation amount by $240,600 to a total of $1,845,300 to reflect increased cost and changed conditions that occurred during construction."* [FAA Item 5 exhibit D]

FAA replied to the City and indicated that the 1994 grant was "financially and administratively closed." [FAA Item 12]

On May 7, 2003, the City submitted a second letter renewing the request for additional funds for the project. Notwithstanding that this request was being withheld pending the outcome of an FAA Notice of Investigation, the City "implore[d] the FAA to reconsider this matter and approve" the amendment. [FAA Item 11]

FAA agreed to "*reopen the grant to amend the grant agreement, thereby increasing the maximum U.S. obligation."* [FAA Item 12] Accordingly, FAA offered the City a grant amendment that increased the Federal obligation to $1,845,300. The City accepted the offer on August 27, 2003. [Item 5 exhibit B] The amendment provided, in part,

> The maximum obligation stated on Page 2, condition 1, is hereby increased by $240,600.00, from $1,604,700.00 to $1,845,300.00. All other terms and conditions of the Grant Agreement remain in full force and effect.

The Final Construction Report, Airport Improvements, Santa Monica Airport, AIP Project No.3-06-0239-06 (II) provided the timing for Phase II as follows: [FAA Item 13]

- Bid Opening - July 30 and August 3, 2000
- Project Award – June 24, 2001
- Pre-construction meeting – August 16, 2001
- Work Started (Construction) – September 24, 2001
- Work Substantially Complete (Construction) – February 20, 2002
- Final Inspection – March 27, 2002

IV. APPLICABLE FEDERAL LAW AND FAA POLICY

The Federal role in civil aviation is augmented by various legislative actions that authorize programs for providing Federal funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely and efficiently and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public fair and reasonable access to the airport.

A. The Airport Improvement Program (AIP)

Title 49 U.S.C., § 47101, *et seq.,* provides for Federal airport financial assistance for the development of public-use airports under the AIP established by the Airport and Airway Improvement Act of 1982, (AAIA) as amended. Title 49 U.S.C., § 47107, *et seq.,* sets forth assurances to which an airport sponsor agrees as a condition of receiving Federal financial assistance. Upon acceptance of an AIP grant, the assurances become a binding contractual obligation between the airport sponsor and the Federal Government. The assurances made by airport sponsors in AIP grant agreements are important factors in maintaining a viable national airport system.

B. Airport Sponsor Assurances

As a condition precedent to providing airport development assistance under AIP, 49 U.S.C., § 47107, *et seq.,* the Secretary of Transportation and, by extension, FAA must receive certain assurances from the airport sponsor. Title 49 U.S.C., § 47107(a) sets forth the statutory sponsorship requirements to which an airport sponsor receiving Federal financial assistance must agree, FAA has also identified assurances that are necessary to carry out the program. The FAA has statutory authority to enforce compliance with the sponsor assurances. FAA Order 5190.6, *FAA Airport Compliance Manual* (Order), provides the assurances for sponsors and policies and procedures to be followed by the FAA in carrying out its functions related to compliance with Federal obligations of airport sponsors. The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized for the duration of their useful life or due to inherent restrictions on aeronautical activities.

Assurance (B)(1), which addresses the duration of the grant assurances, provides:

> *The terms, conditions and assurances of the grant agreement shall remain in full force and effect throughout the useful life of the facilities developed or equipment acquired for an airport development or noise compatibility program project, or throughout the useful life of the project items installed within a facility under a noise compatibility program project, but in any event not to exceed twenty (20) years from the date of the acceptance of a grant offer of Federal funds for the project. However, there shall be no limit on the duration of the assurance against exclusive rights or the terms, conditions, and assurances with respect to real property acquired with Federal funds. Furthermore, the duration of the Civil Rights assurances shall be as specified in the assurance.*

V. ANALYSIS AND DISCUSSION

Motion to Dismiss

The City filed a motion to dismiss based on (1) the Complaint failed to state a claim because it does not state a "specific provision" of the Act that the City has violated, (2) the Complainants lack standing, (3) FAA lacks jurisdiction to grant the relief requested, and (4) the Complainants

failed to engage in good faith efforts to resolve this matter informally. The City filed its motion on August 18, 2014, and the City's motion remains pending. Accordingly, the City filed its answer. 14 CFR § 16.26(b)(5). The Director hereby denies the motion for the reasons set forth below.

Failure to State a Claim

The pleading requirements for Part 16 are set forth in § 16.23 requiring the Complainant to state, "the specific provisions of each Act that the Complainant believes were violated." An "Act" is defined to include a grant assurance.[3] The Director agrees that the Complaint is not clear in terms of the specific Act violated. Nevertheless, the provision is not jurisdictional and to the extent the Director can understand the basis of the Complaint, dismissal is not mandatory. In this case, the Complainants have asked the Director to clarify the expiration date of the grant assurances. The expiration date is set forth in assurance (B)(1).

The Complainants argue the assurances remain in effect until 2023. The City contends they expired in June 2014. [FAA Item 1] FAA construes the Complaint to argue that the City's interpretation violates and/or undermines the grant agreement as a whole and, in particular, grant assurance (B)(1) both of which are "Acts."

The City argues that regardless of its position on the expiration date, it has "*not committed a violation of any Act or Grant Assurance, nor has the City failed to take action that it is required to take under any Act or Grant Assurance.*" [FAA Item 3 page 3] However, the City has made clear in its answer that it regards its grant obligations to the FAA to have ended on June 29, 2014. [FAA Item 5 page 15]

For purposes of this motion to dismiss, we assume, without here deciding, that the Complainants' expiration date is correct. *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. 1994) (on motion to dismiss, Complaint is construed liberally and plaintiff granted the benefit of all inferences than can be derived from the facts alleged). The City's statement then constitutes a repudiation of the contract. Grant assurances are both contractual and statutory in nature, and contract law may guide FAA decisions. *City and County of San Francisco v. FAA,* 942 F.2d 1391, 1396 (9th Cir. 1991). Both California and 9th Circuit case law support the position that where a sponsor has expressly repudiated the grant agreement, FAA need not wait for an actual instance of nonperformance to occur before addressing the issue. *Taylor v. Johnston*, 539 P.2d 425, 430 (Cal. 1975); *First National Mortgage Co. v. Federal Realty Investment Trust*, 631 F.3d 1058, 1069 (9th Cir. 2011); *see also Roehm v. Horst*, 178 U.S. 1, 19 (1900). This reasoning is particularly persuasive when the remedy sought is limited to establishing whether the grant obligation is currently in effect and when it expires.

[3] "Act" is defined as "a statute listed in § 16.1 and any regulation, *agreement*, or document of conveyance issued or *made under that statute*." 14 CFR § 16.3 (emphasis provided). The Airport and Airway Improvement Act of 1982, 49 U.S.C. §47101 *et seq.*, as amended and recodified, is a listed statute. 14 CFR § 16.1(a)(5). The grant assurances are part of an "agreement . . . made under that statute," and thus constitute an "Act" under Part 16.

Finally, the determination of whether a sponsor is reasonably meeting its Federal obligations is a "judgment call." FAA Order 5190.6b, ¶ 2.8(c). An important element of compliance is that "[the] federal obligations are fully understood." *Id.* This case involves not just the understanding of a particular assurance, but whether, as Complainants argue, any assurances apply at all. [FAA Item 4 page 7] A determination on whether the assurances are in effect therefore assures both current and future compliance. Although we will not consider future events or consequences under Part 16, the issue here posed is one in dispute now. Moreover, we may in limited circumstances, consider a case where the current situation portends the high likelihood of a future violation. *See JetAway Aviation LLC v. Montrose County*, Docket No. 16-06-01, Director's Determination at 34 (Nov. 6, 2006).

We find that the Complaint is adequately pleaded and the Director is readily able to determine which "Acts" the Complainants claim are violated. The City has clearly declared what it considers the expiration date of the grants to be, and the Complainants allege the City is wrong. If the date proffered by the Complainants were correct, the City's declaration would constitute an express repudiation of the contract. FAA finds that in the unusual case in which the sponsor expressly and unequivocally declared that the grant agreement expired, and where a reasonable counterargument exists, it is well within FAA's authority to rule upon this limited but threshold issue by clarifying the expiration date. We decline to dismiss this Complaint on the grounds that it fails to state a claim.

Standing

To have standing under 14 CFR Part 16, a party must be *"directly and substantially affected by any alleged noncompliance."* The Complainants include tenants and users of the airport, all of whom allege they will be directly and substantially affected if the City is not grant obligated. [FAA Item 1 pages 2-3] For instance, the Complaint alleges that Krueger Aviation, Inc. is engaged in the sale and brokerage of aircraft at SMO and has been a tenant for 40 years. It leases approximately 10,000 feet of office and hangar space from the City on the south side of SMO. Complainant National Business Aviation Association (NBAA) represents companies that operate aircraft for business purposes. These members include Krueger among others. With the exception of NBAA, the Complainants pay fees (including landing fees) and/or rent to the City for use of SMO.

FAA finds that the Complainants are directly and substantially affected by the City's stated position that its grant obligations have expired. For a motion to dismiss we construe the Complaint in favor of the Complainants and note that the Complainants have pled that the City, but for Federal obligations, would likely close all or part of the airport. It is the City's stated view, ongoing litigation notwithstanding, that most if not all of these obligations ended in July 2015.

FAA finds Complainants' concerns to be reasonable based upon directions the City Council has provided to City staff (i.e. directing studies of potential closures) and a City Resolution, passed in 1981 but never rescinded, that states the policy of the City is to close the airport. [FAA Item 1 page 6] In addition, the City is currently appealing an order dismissing a case in which the City challenged its Surplus Property Act (SPA) obligations. In that case, the City sought an order

"that the United States shall cease and desist from taking any action to require Santa Monica to operate the Airport Property as an airport after the 1984 Agreement expires in July of 2015." [FAA Item 1 exhibit 8]

In the unique context of this case, FAA finds that the Complainants are harmed by the uncertainty involving the grants. Assuming the Complainants are correct that the assurances will expire in 2023, that would still provide an additional 8 years during which Complainants, regardless of how Surplus Property Act issues are resolved, could rely upon the airport remaining open in conformance with the assurances. The assurances provide uniform standards under which to operate that protect the investment of the United States and the rights of users and tenants. These include the fundamental assurance that the airport will be open for public use on reasonable terms. Assuming the assurances are in fact in effect, the stability and fundamental ground rules the assurances create are undermined by the City's repudiation, particularly given the current position of the City Commission, which, regardless of whether the Council has taken action yet, appears to lean towards a full or partial closure.[4] We find the Complainants are directly and substantially affected by the uncertainty of the grant expiration date and have standing to bring this Complaint seeking clarification of that date.

Jurisdiction

Part 16 jurisdiction is established by 14 CFR §16.1. Section 16.1 provides:

> The provisions of this part [16] govern all Federal Aviation Administration (FAA) proceedings involving Federally assisted airports . . . instituted by . . . filing a complaint with FAA under the following authorities.

Among the listed authorities are "[t]he assurances and other Federal obligations contained in a grant-in-aid agreement issued under the Airport and Airway Improvement Act of 1982 (AAIA), as amended and recodified, 49 U.S.C. 47107 et seq., specifically section 511(a), 49 U.S.C. 47107, and 49 U.S.C. 47133."

The FAA is responsible for enforcing the grant assurances. Any action that is contrary to the sponsor's grant assurances is within the scope of FAA to review and address. When information contained in the administrative record to a Part 16 complaint leads the agency to review areas of noncompliance – whether or not they are alleged by the Complainant – the agency will, nonetheless, make a finding on those areas. *See for example, M. Daniel Carey and Cliff Davenport v. Afton-Lincoln County Municipal Airport Joint Powers Board*, FAA Docket No. 16-06-06, (January 19, 2007) (Director's Determination), Issue 7. All potential grant assurance violations are within the scope of FAA to review and address, whether alleged in a Part 16 complaint or identified through any other means. *See Boston Air Charter v Norwood Airport*

[4] See March 25, 2014, City Council Meeting minutes FAA Item 1 page 6 and exhibit 6. Also, see City Council meeting minutes dated October 27, 2015 ("direct staff to look at commencing the CEQA visioning process to do things with the airport other than current uses").

Commission, Norwood, Massachusetts, FAA Docket No. 16-07-03 (August 14, 2008) (Final Decision and Order), pages 26-27.

Section 16.1 is very broad and conveys jurisdiction where a complaint is filed under any of the listed authorities. Here, the Complaint has been filed under the authority of "[t]he assurances and other Federal obligations contained in a grant-in-aid agreement issued under the Airport and Airway Improvement Act of 1982 (AAIA)." Therefore, we find jurisdiction exists.

Failure to Engage in Good Faith Effort to Resolve

The City argues that the Complainants have failed to engage in good faith efforts to resolve this matter informally as required by 14 CFR § 16.21. The Complainants counter that they have exchanged letters with the City on this subject of the Complaint. Complainants' letter of June 11, 2014, raises the issue of the grant expiration date and offers to meet with the City and to utilize a mediator. [FAA Item 1 exhibit 11] The Deputy City Attorney's reply, in the final sentence, informs Complainants' counsel that should he wish to discuss this further, "*you are welcome to contact me.*" [FAA Item 1 exhibit 12]

Despite this offer, the City's response does not directly respond to Complainants' concerns and does not respond in any credible way to the Complainants' offer to meet or mediate. The letter merely states that "*regardless of when the Grant Assurances expire . . . years of formal and informal processes and proceedings lie ahead.*" [FAA Item 1 exhibit 12] As both parties point out, the status of SMO is a contentious issue that has been the subject of significant past and present litigation.

The expiration date itself has been disputed since at least 2011. *City of Santa Monica v. FAA*, 631 F.3d 550, 552 (D.C. 2011). The City's position on the expiration date is clear and unlikely to be voluntarily reversed. The Complainants are not required to conduct continued informal resolution efforts when it appears clear that the City's position on the expiration date is longstanding and fixed.

Accordingly, the motion to dismiss is denied on all grounds.

VI. Issue

Whether the City's Grant Assurance obligations expired on June 29, 2014 or expire on August 27, 2023.

<u>The Legal Effect of the 2008 Director's Determination In re City of Santa Monica, CA</u>

At issue in this case is the expiration date of the City's AIP grant obligations. The Complainants argue that:

> "this issue already has been the subject of an FAA ruling pursuant to Part 16. In re City of Santa Monica, California, docket nos. 16-02-08/FAA-2003-15807, FAA explained: In 2003, the City requested, and FAA approved a grant amendment for $240,600, increasing

its AIP grant total to $10.2 million ... This was the last AIP-funded project at SMO to date. As a result, SMO is obligated under its AIP grant assurances until at least 2023. Director's Determination, at 13 (May 27, 2008) (emphasis added; footnote and citation omitted)."

The Complainants "*concur with the FAA's position as stated in the Director's Determination, and urge FAA to maintain that position in this proceeding.*" [FAA Item 6 page 6].

In contrast, the City contends, "*there has never been an administrative "ruling" by FAA that the City is obligated by its AIP grant assurances until 2023.*" The City states that the issues in the prior Directors Determination had nothing to do with the expiration date of the grant assurances. [FAA Item 7 page 2]

The date was at issue in administrative litigation that culminated in a ruling from the U.S. Court of Appeals for the DC Circuit. *See City of Santa Monica v FAA*, 631 F.3d 550 (DC 2011). In that case, the court found that it could resolve the material issues without determining the grant expiration date, which it noted remained disputed. *Id.* at 552. The FAA accordingly accepts the City's contention that the 2008 administrative determination is not dispositive, and this Director's Determination constitutes a fresh examination of the issue based on the record before us now.

The Expiration Date is determined by the earlier of the Useful Life of the project and the Not-To-Exceed Date of No More Than 20 Years from Acceptance of the Grant Offer

The FAA may approve a project grant application "only if" it receives written assurances "satisfactory to the Secretary." Title 49 U.S.C. § 47107(a). To modify the assurances or to require compliance with an additional assurance, FAA must publish notice in the Federal Register and provide an opportunity for comment. Title 49 U.S.C. § 47017(a). The assurances in effect at the time the City of Santa Monica entered into its grant, on June 27, 1994, were noticed in the Federal Register on February 3, 1988. 53 Fed. Reg. 3104 (Feb. 3, 1988). Between February 3, 1988 and June 27, 1994, FAA amended the grant assurances twice. Neither affected the provision on duration.[5]

These covenants are not contractual terms open to negotiation, but vital legal requirements imposed by statute. *"The conditions Congress imposed on the grant to local airport proprietors of money from the Airport and Airway Trust Fund are designed in part to insure the maintenance of conditions essential to an efficient national air transport system, including access to airports on a reasonable and nondiscriminatory basis." City and County of San Francisco v. FAA*, 942 F.2d 1391, 1395 (9th Cir. 1991).

[5] See 53 Fed. Reg. 34361 (Sept. 6, 1998); 54 Fed. Reg. 35748 (Aug. 29, 1989); A change noticed on June 10, 1994 also did not affect the duration provision, and in any event only took effect on July 11, 1994, so it does not apply to the assurances as they existed on June 27, 1994. See 59 Fed. Reg. 30076.

The Duration of the Grant Assurances Fall into Three Categories

The duration of the assurances is provided in the assurances themselves. The assurances fall into three categories in terms of duration. First are the assurances for which there is "no limit" on duration. These assurances never expire so long as the airport is operated as an airport. Included in this category are "the assurances against exclusive rights [and] the terms, conditions, and assurances with respect to real property acquired with Federal funds." Grant Assurance (B)(1)

Second are the civil rights assurances the duration of which is specified in the assurance themselves. Generally, the civil rights assurances also extend to the period during which the airport is used as an airport.

Third, are all the other remaining assurances. The date that this order seeks to determine applies to the third category.

Assurance (B)(1) provides:

> The terms, conditions and assurances of the grant agreement shall remain in full force and effect throughout the useful life of the facilities developed or equipment acquired for an airport development or noise compatibility program project, or throughout the useful life of the project items installed within a facility under a noise compatibility program project, but in any event not to exceed twenty (20) years from the date of the acceptance of a grant offer of Federal funds for the project. However, there shall be no limit on the duration of the assurance against exclusive rights or the terms, conditions, and assurances with respect to real property acquired with Federal funds. Furthermore, the duration of the Civil Rights assurances shall be as specified in the assurance.

Assurance (B)(1) does not provide a time-certain date on which the assurances expire, but rather provides the methodology for determining that date.

The issue in this matter arises because on August 27, 2003, the parties executed an amendment that increased the Federal grant amount by $240,600.00. At issue is the significance of this amendment.

Complainants argue that when the City accepted $240,600 of additional funds in 2003 it extended the not-to-exceed date to 2023. [FAA Item 3 exhibit B]

The useful life for this project

For the assurances at issue here, the expiration date is provided by the methodology specified in Assurance (B)(1). Under (B)(1), the expiration date is a function of useful life, but is capped by a not-to-exceed date that is tied to the date the sponsor accepted an offer of Federal funds. Thus, there are two dates at play. In this Determination, we will refer to these dates as the not-to-exceed date and the useful life date.

For useful life (B)(1) provides,

> the grant agreement shall remain in full force and effect throughout the useful life of the facilities developed or equipment acquired for an airport development or noise compatibility program project, or throughout the useful life of the project items installed within a facility under a noise compatibility program project . . .

Useful life commences from the point that the improvement is placed in service. There is no disagreement among the parties on when useful life commenced for this project. The parties agree that grant Amendment No. 2 funded a blast wall. They similarly agree that the wall was submitted for final inspection on March 27, 2002, and having passed final inspection, that is the date it was put into service. Based on the consensus position of the parties, FAA agrees that the blast wall was placed in service on March 27, 2002. With the service date determined, we now turn to useful life.

The FAA's presumptive useful life is 20 years.[6] The City has provided no position or opinion on the useful life of the blast wall, but the engineer notes that approximately 13 years of service have produced no apparent wear.[7] [FAA Item 10]

The Complainants suggest a useful life in excess of 25 years. This position is based on the opinion of a civil engineer, hired by the Complainants, who inspected the wall in 2015. This engineer noted that a similar blast wall at Bob Hope Airport has been in service for at least 30 years. The engineer testified that he had prior experience and responsibility with regard to the "condition and potential of airport structures." Declaration of Leopold Klabbers. [FAA Item 9] A similar blast wall at Bob Hope Airport was part of the structures for which he had responsibility and he testified that he also had a role in a "slight[] modifi[cation]" to the wall that occurred shortly after its construction.

Weighing all the testimony and particularly noting the static nature of the blast wall, the testimony of an engineer experienced with such walls, the useful life of a similar wall, lack of any apparent wear, and no contrary position set forth by the City, we accept the position of the Complainants and find the blast wall to have a useful life of 25 years.[8]

As the maximum duration of this assurance is 20 years from the date of acceptance of the grant used for this project, that date rather than the longer useful life date governs. Thus, the useful life ends on March 27, 2027.

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[6] FAA Order 5190.6B, p.4-3.

[7] The City provided testimony of a civil engineer in its Public Works Department, but the engineer concludes that he does not know what the useful life is. The engineer did note that the blast wall *"appears to be in a similar condition" from when "it was installed and began its useful life 13 years ago in 2002."*

[8] Complainants actually argue for a useful life in excess of 25 years, but fail to support or adequately limit such an open-ended assertion.

Not to exceed date

In determining the expiration date, (B)(1) provides that the expiration dates are "*not to exceed twenty (20) years from the date of the acceptance of a grant offer of Federal funds for the project.*" Upon acceptance of an offer of Federal funds for an AIP project, the assurances become a binding contractual obligation between the airport sponsor and the Federal Government.

On June 29, 1994, the City of Santa Monica accepted an AIP grant for a project at SMO. The grant agreement attached the standard set of grant assurances. Had nothing else happened, the not-to-exceed date for the grant assurances would have been June 29, 2014, the date that the City argues is, in fact, the actual expiration date.

Complainants, however, observe that this is not the last date on which grant funds were accepted by the City. On September 27, 2002, the City Manager wrote to FAA and indicated that the City "*requests to amend the Federal Grant for Project No. AIP 3-0600239-06(II) to increase participation amount by $240,600 to a total of $1,845,300 to reflect increased costs and changed conditions which occurred during construction.*" [FAA Item 5 exhibit 4] This was a 15 percent increase to the original amount of the grant.

According to a subsequent letter from the City dated May 7, 2003, the City's request was not approved due to an ongoing FAA investigation. In addition, FAA considered the grant closed as of October 19, 2001. [FAA Item 12] The May 7, letter reiterated the City's request for additional funds and *"implore[d] FAA to reconsider this matter and approve the requested grant reimbursement so the funds can be used to enhance and maintain the Santa Monica Airport."* The letter indicated that the "*requested reimbursement funds represent a substantial amount of revenue that could be utilized for much-needed and differed airfield maintenance projects."* [FAA Item 11] Based on this letter, FAA wrote to the City and agreed to "*reopen the grant to amend the grant agreement, thereby increasing the maximum U.S. obligation.*" [FAA Item 12]

On August 27, 2003, FAA and the City executed "Amendment No. 2 to Grant Agreement for Project No. 3-06-0239-06." The amendment provided *"in consideration of the benefits to accrue to the parties hereto"* the parties *"mutually agree that said Grant Agreement be and is hereby amended as follows: The maximum obligation . . . is hereby increased by $240,600.00 . . . ."* The amendment did not have its own provision on the expiration date but provided that *"[a]ll other terms and conditions of the [original] Grant Agreement remain in full force and effect."* [FAA Item 3 exhibit B]

Complainants argue that when the City sought and accepted $240,600 of additional funds in 2003, a 15 percent increase from the original grant, it extended the not-to-exceed date to 2023. [FAA Item 1 page 7]

The City argues that the original 1994 grant agreement governs the expiration date and that under that agreement upward and downward adjustments in the grant amount were contemplated, and that nothing suggested that "*additional phases or amendments to the Agreement or the final audit"* would constitute a separate agreement that would restart the not-to-exceed date. [FAA Item 5 page 18]

The City also states that, "*the City's very reasonable interpretation of the contract taken from the plain and express language within the four corners of those documents must control and, therefore, the FAA's determination must be that City's obligations ended pursuant to the Agreement in June 2014.*" [FAA Item 5 page 4]

Additionally, the City asserts that if there is any ambiguity in the documents then "*both federal and state law dictate that such ambiguity must be interpreted against the drafter of the contract.*" [FAA Item 5 pages 4 and 5]

Consideration for the Second Amendment

The Director disagrees with the City's assertions. Unlike the first amendment to the grant, changing the description of work but adding no funds, the second amendment involved an additional significant obligation of federal funds and ***no*** additional work performed or benefit to the public other than from the extension of the grant covenants. All AIP grants require that the cost of the project be shared between the Federal Government and the airport sponsor, Title 49 U.S.C. 47109. This section of law requires that the airport sponsor, the City in this instance, absorb a ***minimum*** percentage of the cost of the project. The agency is in no way obligated to provide increased funding if there is an overrun; on the contrary, grant recipients should expect to cover such overruns as part of its contribution to the project. Instead, in this instance the grant recipient requested the additional funds in order to free up resources for other airfield maintenance projects.

The City makes a number of arguments based on standard principles of contract law, but ignores the most fundamental principle of contract law – the need for an exchange of consideration. This principle applies to grant agreements just as much as to procurement contracts. *See, e.g., Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005). In this matter, the work for which the 1994 grant had been provided had been completed and the grant closed. The City realized it had incurred an overrun, and implored FAA to provide additional funding. The FAA agreed to do so, and provided the funding.

It is clear what consideration FAA provided, additional funding. The only consideration for the amendment provided by the City, however, would be the continued applicability of the grant assurances using the date of the signed second amendment as the starting date. Adherence to the conditions Congress sets in exchange for receiving grant funds has repeatedly been held to be the necessary consideration for the contract that is a grant agreement. *Id., see also, Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 17 (1981). Simply continuing to adhere to the grant assurances using the date of the award of the original grant would provide no new consideration to support the additional funds provided.

The Second Amendment was a new obligation akin to a new grant

The City argues that there was nothing to indicate that the second amendment would have the effect of extending the expiration date of these assurances, or be the equivalent of a new grant.

The second amendment, however, bore every indicia but one of being a new contract: the old grant had been closed; the second amendment was mutually agreed to and signed by both parties;[9] there was an offer, acceptance and an exchange of consideration. Under these circumstances, the Government Accountability Office has held that the funds provided for the amendment are for in essence the award of a new grant. 41 Comp. Gen. 134 (1961).[10]

The only arguably contrary indicator was the agreement that the terms and conditions of the original grant would remain in force.[11] As the scope of work for which the funds were provided was unchanged, and the assurances are statutory requirements the language of which does not change from grant to grant, this statement is neither surprising nor incorrect. It is the amount of the grant that was enlarged rather than the scope of what the grant was for. When a grant is enlarged beyond the scope of the original such that a new financial obligation is made, it "must be considered as giving rise to a new grant." 39 Comp.Gen. 296, 298 (1959).[12]

The City understood the requirements of the statutorily required grant assurances

The City argues, in essence, that there was no meeting of the minds for the second amendment. The City Manager and the City Attorney executed this amendment on August 29, 2003. The amendment was signed during a period in which there was an ongoing FAA investigation[13] of the City's ban on category C and D aircraft – a ban that FAA alleged, and which the U.S. Court of Appeals for the D.C. Circuit affirmed, violated the very assurances here at issue. *City of Santa Monica v. Federal Aviation Administration,* 631 F.3d at 559 (D.C. Cir. 2011).

Moreover, in prior attempts to close the airport or to consider closing the airport, the City was reminded in formal opinions from both the City Attorney and the California Attorney General

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[9] Typically, purely administrative changes to an agreement can be signed only by the Government and do not require mutual agreement. *See* 48 CFR 43.103(b) (this particular regulation concerns procurement contracts, but demonstrates the general distinction between bilateral and unilateral changes).

[10] GAO focuses on the requirement in these circumstances to use funds current in the year the amendment is made rather than funds current in the year the original grant was made. The AIP is funded entirely with "no year" funds, i.e., funds available until expired, so it is not possible to compare the funds used when the second amendment was made to the funding used when the grant was originally awarded. It is the principle that under these circumstances the second amendment is in essence a new grant, rather than the type of funds used, which is relevant to this decision. In this particular GAO decision, additional funds were needed to complete the work, so completion of the work was sufficient consideration for the additional funds. In the matter at hand, however, the work had already been completed, and thus the need for additional consideration.

[11] The City also mentions the fact that the grant number remained the same. *[FAA Item 5 page 19].* The same grant number was used because the funds were for work already completed under that grant number. The Director finds that the use of the same AIP grant number for the second amendment does not obscure the fact that a new obligation of funds were made, consideration for which was an extension in the applicability of the grant assurances.

[12] Another GAO case establishes the principle that if the bona fide need for the project remains the same, the purpose of the grant remains the same and the scope of the project remains the same, then the amendment is not equivalent to a new grant. 58 Comp. Gen. 676 (1979). Here, the purpose and scope of the project remained the same, but the bona fide need had already been met. The work had been completed, but additional funds beyond what had been originally agreed to were provided.

[13] See Letter from Bob Trimborn, Airport Manager to William Withycombe, FAA Regional Administrator (May 7, 2003) (reference FAA's Notice of Investigation, Docket No. 16-02-08).

that Federal funding comes with reciprocal obligations that require the airport to remain open.[14] Because of the controversy that surrounded the City's Federal obligations both at the time of the amendment and well before, the City knew or should have known that by seeking, and accepting additional Federal funds, congressionally mandated assurances would continue to apply. As the City offered no other consideration for the significant increase in funds, it knew or should have known that acceptance of these new funds would restart the date of that these assurances would apply.

Settlement Agreement

The City's argument that its intent is congruent with the Settlement Agreement is also rejected. The Agreement itself makes clear that only those grant agreements executed prior to July 1, 1995 would not extend or alter operational obligations. Settlement Agreement, p. 8-9. The amendment at issue here is from 2003. Moreover, the Settlement Agreement itself acknowledged that Federal statute would control. *[Id. at 9]* That statute, 49 U.S.C. 47107, requires compliance with the relevant grant assurances for a period of not more than 20 years from the date the grant was accepted. As the second amendment was a new obligation of funds without a commensurate increase of scope of the grant, other than from an extension in the grant assurances, it is reasonable to interpret the additional grant funds as the beginning of a 20-year grant obligation period based on the City's acceptance.

Interpretation of the Grant Assurances

The City argues that the plain language of the grant supports its position and that if there is any ambiguity the rule of *contra proferentem* applies. Federal grants, however, are a hybrid – partly a contract in terms of voluntary offer, acceptance and consideration, and partly a creature of statute in terms of the conditions imposed by Congress in exchange for the funds. In *Bennett v. Kentucky Department of Education*, 470 U.S. 656, 669 (1985), the U.S. Supreme Court expressly addressed this issue. In that case it was argued that the contractual aspects of Federal grants meant that the doctrine of *contra proferentem* should apply to resolve any ambiguities. The Court held that as grants originate in and are governed by Federal statutes, the rules governing statutory interpretation apply.

Consistent with this opinion, subsequent courts have held that FAA is entitled to deference in interpreting the grant assurance obligations. In *BMI Salvage Corp. v. Federal Aviation Administration, Miami-Dade County, Florida, U.S. Court of Appeals 11th Circuit No. 11-12583, (July 19, 2012),* the court found "[b]ecause the FAA's interpretation is not plainly erroneous or inconsistent with the statute, we conclude that the FAA's finding that demolition is non-aeronautical is entitled to deference."

Under the plain language of assurance (B)(1), the not-to-exceed date is linked to "*a* offer" and not limited to the *original* offer. With the work for which the grant funds were originally provided completed, and the grant itself closed, additional consideration was needed for the additional funding. General reference to the additional consideration was in the language of the

[14] California Attorney General Opinion, CV 74-317 (May 30, 1975); Opinion of the City Attorney (Jan. 23, 1962).

second amendment -- FAA "has determined it to be in the interest of the United States" and that the second amendment was entered into "in consideration of the benefits to accrue to . . . [both] parties . . . ." That consideration was, as it usually is for grants, agreement by the grant recipient to be bound by the statutory grant covenants. The applicable assurance at issue continues until throughout the useful life of the project but no later than 20 years from the date of that acceptance, August 27, 2003.

The Director's finding here yields a reasonable outcome and is consistent with Congressional intent in establishing the AIP. The grant assurances are designed to assure that FAA and the public receive a benefit in return for the Federal investment. Assurance (B)(1) reflects the FAA's expectation that the benefit to the public extends, in general, for approximately 20 years.

In this matter, the useful life would be longer, but the grant assurance is not to exceed 20 years from acceptance of the new grant funds. The continued applicability of the relevant grant assurances until August 27, 2023, is consistent with the useful life of the project and the public benefit resulting from the project. Under the City's approach, the applicable grant assurances would have expired in 2014, yielding only 12 years of use and benefit from the improvements that were completed in 2002; a result at odds with the conditions, intent and purpose of the FAA's grant program.

All other arguments made by the City have been considered and are not supported by the law or the facts.

VII. Findings and Conclusions

Upon consideration of the submissions of the parties, the entire record herein, the applicable law and policy, the Director, Airport of Compliance and Management Analysis, finds and concludes that the City remains obligated by the grant assurances until August 27, 2023. This finding is based on the acceptance of Amendment No. 2 on August 27, 2003, resulting in additional AIP funds provided to the City. This acceptance of FAA offer of additional grant funds, after the project had been completed, triggers the grant assurance under (B)(1) to remain in force for 20 years from August 27, 2003.

ORDER

ACCORDINGLY, the Director finds that the Respondent City of Santa Monica remains obligated by the grant assurances until August 27, 2023.

RIGHT OF APPEAL

This Director's Determination is an initial agency determination and does not constitute final agency action and order subject to judicial review. [14 CFR 16.247(b)(2)] A party to this Complaint adversely affected by the Director's Determination may appeal the initial determination to FAA Associate Administrator for Airports pursuant to 14 CFR 16.33(b) within thirty (30) days after service of the Director's Determination.

Byron K. Huffman
Acting Director, Office of Airport Compliance
and Management Analysis

December 4, 2015
Date